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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE RAMOS VASQUEZ,

Defendant and Appellant.

H037144

(Santa Clara County

Super. Ct. No. C1068496)

Defendant Joe Ramos Vasquez, who is required to register as a sex offender because of a prior conviction, was convicted by plea of failing to notify police of his new address in violation of Penal Code section 290.013, subdivision (a), with an admitted strike prior and two prison priors.¹ (§§ 667.5, subd. (b)-(i) & 1170.12.) After the court denied his *Romero*² motion, he was sentenced to 32 months in prison. Because he was arrested by police from the City of San Jose, the court, at sentencing and without objection, imposed a booking fee of \$129.75 under Government Code section 29550.1. This section, unlike Government Code sections 29550 and 29550.2, does not contain a provision concerning a defendant's ability to pay. The court also, without objection,

¹ Further unspecified statutory references are to the Penal Code.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

awarded a total of 615 days of pre-sentence credit, of which 204 days were conduct credit calculated under former code section 4019, subdivision (f).³

On appeal, Vasquez challenges the booking fee under principles of equal protection, contending that an ability-to-pay provision should be read into Government Code section 29550.1 and that the record contains insufficient evidence of his ability to pay. He alternatively claims ineffective assistance of counsel for his attorney's failure to have objected to the booking fee below. Through supplemental briefing, he also contends on equal protection grounds that he is entitled to additional conduct credit based on legislative changes to section 4019, expressly operative to crimes committed on or after October 1, 2011. We reject these contentions and affirm the judgment.

STATEMENT OF THE CASE

I. *Factual Background*

Vasquez was required to register as a sex offender under section 290 because of a conviction in 2000 for lewd conduct on a child under 14 in violation of section 288, subdivision (a). After his later 2005 conviction for failing to register as a sex offender in violation of section 290.013, subdivision (a), he was discharged from parole in January 2009. On June 3, 2009, he registered his address as 3310 Invicta Way.

³ The information alleged that the crime was committed on December 17, 2009. Defendant pleaded no contest on October 5, 2010, and he was sentenced on June 30, 2011. As we will explain, section 4019 was amended effective January 25, 2010, and again effective September 28, 2010, but defendant's credits were properly calculated under the version of section 4019 in effect either on the date he committed the crime or on the date he was sentenced. Both versions yield the same amount of pre-sentence conduct credits awarded at the one-for-two total rate, given Vasquez's admitted prior serious felony as defined in section 1192.7 and the admitted requirement that he register as a sex offender. (Stats. 1982, ch. 1234, § 7 [former § 4019, subd. (f), operative to Jan. 24, 2010]; Stats. 2010, ch. 426, §§ 1 & 2 [former §§ 4019 & 2933, operative Sept. 28, 2010-Sept. 30, 2011].)

On December 17, 2009, a San Jose police officer visited Vasquez's registered address and spoke to the property owner, who lived there. She indicated that defendant had lived in a rented room at the address but that he had failed to pay rent for several months and had not been seen at the residence since December 1, 2009. Some of his belongings remained but the property owner said that she thought Vasquez had moved. He had told her he would be visiting a sister who lived out of state at Thanksgiving and that he hoped to then move to Texas.

On May 16, 2010, Vasquez was arrested at a motel on First Street in San Jose on a warrant for non-compliance with his obligation to register his new address with police. He denied that he had moved out of the residence at Invicta Way and said that he had merely gone to visit his sister.

II. *Procedural Background*

After being bound over for trial, Vasquez was charged by information with failing to notify police of his new address in violation of section 290.013, subdivision (a). The information included allegations that he had a prior serious felony conviction and two prior prison terms. (§§ 667.5, subd. (b); 667, subds. (b)-(i) & 1170.12.) In a negotiated plea bargain, Vasquez pleaded no contest and admitted the enhancement allegations.

On June 30, 2011, the court denied defendant's *Romero* motion and sentenced him to 32 months in prison, consistently with the plea bargain. The court imposed various fines and fees, including, without objection, a "\$129.75 Criminal Justice Administration fee to [the] City of San Jose," also known as a booking fee. The court awarded 615 days of pre-sentence credits, of which 411 were actual days and the remaining 204 were conduct credits under former section 4019.⁴ (Stats. 1982, ch. 1234, § 7.) The court later amended the abstract of judgment on August 17, 2011, to correct a clerical error.

⁴ See footnote 3, *ante*.

Vasquez timely appealed from the judgment of conviction, challenging the sentence or matters occurring after the plea but not affecting its validity. (Cal. Rules of Court, rule 8.304(b).)

DISCUSSION

I. *The Booking Fee*

A. *Defendant's Equal Protection Challenge Has Been Forfeited*

As noted, the booking fee here was imposed under Government Code section 29550.1, which does not contain a conditional provision concerning a defendant's ability to pay the fee. We observed in *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*), that "Government Code sections 29550, 29550.1, and 29550.2 govern fees for booking or otherwise processing arrested persons into a county jail. To some degree, they vary based on the identity of the arresting agency. Arrests made by a 'city, special district, school district, community college district, college, university or other local arresting agency' are governed by Government Code sections 29550, subdivision (a)(1) and 29550.1. Arrests made by a county are governed by Government Code section 29550, subdivision (c) and those made by 'any governmental entity not specified in Section 29550 or 29550.1' are governed by Government Code section 29550.2, subdivision (a)." (*Pacheco, supra*, 187 Cal.App.4th at p. 1399, fn. 6.)

Unlike Government Code section 29550.1, Government Code sections 29550 and 29550.2 each contain a (different) provision for imposing a booking fee as a condition of probation and basing the fee on a defendant's ability to pay. Vasquez contends that defendants who are arrested by any governmental agency are similarly situated and that the statutory differences in treatment regarding imposition of the booking fee to be

imposed based largely on which governmental entity made the arrest are irrational and arbitrary.⁵

Vasquez couches his challenge to the booking fee imposed here as being based on insufficient evidence of his ability to pay it. But because Government Code section 29550.1 does not contain a provision basing the imposition and the amount of the booking fee on a defendant's ability to pay, we need not reach the sufficiency-of-the-evidence question unless and until we conclude that principles of equal protection compel us to read an ability-to-pay provision into the statute, which, in actuality, is Vasquez's primary and threshold claim. This brings us to whether Vasquez has forfeited or waived his equal protection challenge to Government Code section 29550.1 by his failure to have raised it below. We conclude that the contention is indeed waived.

⁵ The argument goes like this: Government Code section 29550.1 provides that where a city's officer or agent arrests an individual, the city is entitled to recover from the arrestee any criminal justice administration fee imposed upon it by a county. The statute makes no mention of the booking fee's imposition being conditioned on a defendant's ability to pay it. In contrast, other statutes that address booking fees—specifically, Government Code section 29550, subdivisions (c) and (d), and Government Code section 29550.2, subdivision (a)—contain specific requirements that the court determine that the defendant has the ability to pay the fee. Defendant argues that the three statutes treat similarly situated persons differently. “For a defendant who, like appellant, is booked into a county jail and ultimately is convicted and not granted probation, the statutes make arbitrary distinctions as to whether an order to pay a booking fee is mandatory or discretionary, and whether or not imposition of the fee is contingent on a finding that a defendant has the ability to pay the fee. The distinction is based solely on what agency makes the underlying arrest.” Because, defendant argues, there is no rational basis for this different treatment, the requirement under Government Code section 29550.1 that a booking fee be imposed, irrespective of a defendant's ability to pay it, violates equal protection. Defendant asserts that the proper remedy here is to imply an ability-to-pay clause in Government Code section 29550.1. Under this approach, because the court below made no finding of his ability to pay the booking fee, and, he argues, there is no substantial evidence in the record upon which an implied finding of ability to pay may rest, the booking fee cannot withstand attack, and must be reversed.

“ ‘ “No procedural principle is more familiar to this Court than that a constitutional right,” or a right of any other sort, “may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.” [Citation.]’ [Citation.]” (*People v. Saunders* (1993) 5 Cal.4th 580, 589–590, quoting *United States v. Olano* (1993) 507 U.S. 725, 731.) The purpose of the forfeiture doctrine “ ‘is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had. . . .’ ” (*People v. Walker* (1991) 54 Cal.3d 1013, 1023.)

The doctrine of forfeiture has been applied in a variety of contexts to bar claims not preserved in the trial court in which the appellant had asserted an abridgement of fundamental constitutional rights. In a number of instances, courts have found that the appellant’s unpreserved equal protection claims, such as the one made by defendant here, were forfeited. (See, e.g., *People v. Alexander* (2010) 49 Cal.4th 846, 880, fn. 14 [claim that denial of motion to exclude testimony based upon possible hypnosis of witness violated equal protection forfeited]; *People v. Burgener* (2003) 29 Cal.4th 833, 861, fn. 3 [claim that practice of supplementing jury panels with additional minority prospective jurors violated equal protection forfeited]; *People v. Carpenter* (1997) 15 Cal.4th 312, 362, superseded by statute on other grounds as recognized in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, superseded by statute on another ground as recognized in *People v. Gonzales* (2011) 51 Cal.4th 894, 927, fn. 15 [claim that denial of severance motion violated equal protection forfeited]; *People v. Sumahit* (2005) 128 Cal.App.4th 347, 354, fn. 3 [claim that departmental practice of not recording SVP interviews violated equal protection forfeited]; *People v. Hall* (2002) 101 Cal.App.4th 1009, 1024 [claim that interpretation of statute authorizing AIDS testing violated equal protection forfeited].)

The forfeiture doctrine generally “applies in the context of sentencing as in other areas of criminal law.” (*In re Sheena K.* (2007) 40 Cal.4th 875, 881.) For instance, in

People v. Scott (1994) 9 Cal.4th 331, 352, the high court held that a defendant cannot complain for the first time on appeal about the trial court's failure to state reasons for a sentencing choice, reasoning that "[r]outine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention." (*Id.* at p. 353; see also *People v. Tillman* (2000) 22 Cal.4th 300, 302-303 [People forfeited its unpreserved challenge to court's failure to state reasons for not imposing restitution fine, a decision constituting discretionary sentencing choice].) Similarly, relying on *Scott*, the appellate court held that a defendant's unpreserved claim that the trial court committed sentencing error by failing to specify its reasons for selecting an upper-term sentence had been forfeited. (*People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1511-1512.) Challenges to the reasonableness of probation conditions are likewise forfeited if the objection is not made in the trial court. (*People v. Welch* (1993) 5 Cal.4th 228, 237; cf. *In re Sheena K.*, *supra*, at pp. 887-889 [unpreserved challenge that probation condition was unconstitutionally vague and overly broad presented pure questions of law not forfeited].)

As it applies to sentencing error claims, there is a narrow exception to the forfeiture doctrine recognized by the high court for sentences that are not authorized under the law. As the Supreme Court explained in *People v. Smith* (2001) 24 Cal.4th 849, 852, "We have . . . created a narrow exception to the waiver rule for 'unauthorized sentences' or sentences entered in "excess of jurisdiction." ' [Citation.] Because these sentences 'could not lawfully be imposed under any circumstance in the particular case' [citation], they are reviewable 'regardless of whether an objection or argument was raised in the trial and/or reviewing court.' [Citation.] We deemed appellate intervention appropriate in these cases because the errors presented 'pure questions of law' [citation], and were ' "clear and correctable" independent of any factual issues presented by the record at sentencing.' [Citation.] In other words, obvious legal

errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable.”

It is undisputed that Vasquez did not raise any challenge below to the booking fee. His claim that the court’s imposition of a booking fee through application of Government Code section 29550.1 violated his equal protection rights, like other unpreserved equal protection challenges, cannot be maintained on appeal. (*People v. Alexander, supra*, 49 Cal.4th at p. 880, fn. 14; *People v. Burgener, supra*, 29 Cal.4th at p. 861, fn. 3.) And his contention is not one concerning the imposition of an unauthorized sentence that would fall within the “narrow exception to the waiver rule” for unpreserved claims of sentencing error. (*People v. Smith, supra*, 24 Cal.4th at p. 852.)

In what may be an implicit acknowledgment that his claim is forfeited, defendant argues that we should address it nonetheless because “it presents a pure question of law.” He cites *In re Sheena K., supra*, 40 Cal.4th 875, in support of this assertion. There, the high court held that the failure to object at sentencing did not forfeit a juvenile’s claim that a probation condition was unconstitutionally vague and overly broad where the claim presented “a pure question of law, easily remediable on appeal by modification of the condition.” (*Id.* at p. 888.) In so holding, the court noted that such a constitutional challenge to a probation condition had some similarity to a “challenge to an unauthorized sentence that is not subject to the rule of forfeiture” because correction of errors in both instances “may ensue from a reviewing court’s unwillingness to ignore ‘correctable legal error.’ [Citation.]” (*Id.* at p. 887.) The constitutional claim here involves neither a probation condition nor a claimed unauthorized sentence, and we conclude that the “pure question of law” language of *In re Sheena K.* does not afford defendant grounds for reviewing his forfeited claim here.

Vasquez also argues that his claim is not forfeited under the authority of *Pacheco*. There we held that the defendant’s challenges to the court’s imposition of a booking fee

under either Government Code sections 29550, subdivision (c) or 29550.2 (as well as probation fees and attorney fees) were not forfeited, notwithstanding his failure to object to them below. (*Pacheco, supra*, 187 Cal.App.4th at p. 1397.) The defendant challenged the booking fee because the trial court did not make a determination that he had the ability to pay the fee and there was insufficient evidence to support such a determination. (*Ibid.*) In that context, we relied on two attorney fees cases (*People v. Viray* (2005) 134 Cal.App.4th 1186; *People v. Lopez* (2005) 129 Cal.App.4th 1508), concluding that “claims . . . based on the insufficiency of the evidence . . . do not require assertion in the court below to be preserved on appeal.” (*Pacheco, supra*, at p. 1397.) Here, the argument is that the imposition of the booking fee under Government Code section 29550.1 without an ability-to-pay requirement violated defendant’s equal protection rights. This is not a sufficiency-of-the-evidence argument. Accordingly, *Pacheco* is distinguishable and does not support defendant’s contention that he did not forfeit his equal protection challenge.⁶

Moreover, the problem with Vasquez’s equal protection challenge is that by failing to raise this issue below, he has failed to make a record that affirmatively shows that he is aggrieved by the law he attacks. In other words, he has failed to make a record that

⁶ We acknowledge that other courts have applied the forfeiture doctrine to unpreserved sufficiency-of-the-evidence claims similar to those raised in *Pacheco*. (See, e.g., *People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [crime prevention fine]; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [booking fee under Gov. Code, § 29550.2]; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1467 [restitution fine].) A case involving an unpreserved challenge to a booking fee imposed under Government Code section 29550.2 is pending before the California Supreme Court. (See *People v. McCullough* (2011) 193 Cal.App.4th 864, review granted on Jun. 29, 2011, S192513.) Because *Pacheco* is distinguishable from this case, which involves a forfeited constitutional challenge, the Supreme Court’s ultimate determination of whether the forfeiture doctrine applies to sufficiency-of-the-evidence challenges such as those presented in *Pacheco* would have no bearing on our conclusion here that defendant forfeited his constitutional challenge.

shows that he has standing to raise an equal protection challenge to section 29550.1.

“ ‘One who seeks to raise a constitutional question must show that his rights are affected injuriously by the law which he attacks and that he is *actually* aggrieved by its operation.’ [Citation.]” (*People v. Cortez* (1992) 6 Cal.App.4th 1202, 1212, italics added.) The record must contain evidence showing that appellant is actually aggrieved by the law he attacks in order to confer standing. (*People v. Black* (1941) 45 Cal.App.2d 87, 96.)

To be aggrieved by the law he challenges, defendant must show that he does not have the ability to pay the fee, but that it will be imposed regardless of this inability to pay.⁷ As the record fails to affirmatively show that he will not even be able to obtain prison employment, we must assume that for purposes of the booking fee he will be able to do so. (See *People v. Frye* (1994) 21 Cal.App.4th 1483, 1486–1487; §§ 2700, 2801, 2805.) Section 2700 provides, in relevant part, “The Department of Corrections shall require of every able-bodied prisoner imprisoned in any state prison as many hours of faithful labor in each day and every day during his or her term of imprisonment as shall be prescribed by the rules and regulations of the Director of Corrections.” This section requires that prisoners who perform assigned work be compensated. With nothing developed below that shows that defendant is unable to work in prison, we must assume

⁷ To the extent the record contains evidence that might bear on defendant’s ability to pay, it largely suggests the contrary, that he has the ability to pay the relatively de minimus booking fee. For example, the record shows that in spite of previously having a “difficult time” with parole, Vasquez apparently “maintain[ed] gainful employment the entire time” and is “a hard worker who has nearly always been gainfully employed.” He has consistently worked in a variety of settings, including as a fruit picker, as a janitor, as a forklift operator, as an “inventory specialist” in shipping and receiving, as a cook at Denny’s, and as a “driver/deliverer for a distribution company.”

that he will have the ability to pay the minimal booking fee and therefore is not aggrieved by the statute he challenges.⁸

As a result, in addition to finding that Vasquez forfeited his equal protection challenge to Government Code section 29550.1, we further conclude that he does not have standing to raise this equal protection challenge because he has not demonstrated that he has been aggrieved by application of this statute. Consequently, we need not consider the merits of Vasquez's attempted challenge to section 29550.1 on equal protection grounds.

B. *Defendant Has Not Demonstrated Ineffective Assistance of Counsel re the Booking Fee*

An ineffective assistance of counsel claim requires a showing that “counsel’s action was, objectively considered, both deficient under prevailing professional norms and prejudicial.” (*People v. Seaton* (2001) 26 Cal.4th 598, 666, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*)). “[T]he burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel’s failings.” (*People v. Lewis* (1990) 50 Cal.3d 262, 288; see also *People v. Weaver* (2001) 26 Cal.4th 876, 961.) This means that the defendant “must show both that his counsel’s performance was deficient when measured against the standard of a reasonably competent attorney and that counsel’s deficient performance resulted in prejudice to [the] defendant in the sense that it ‘so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.’ [Citations.]”

⁸ It may take Vasquez a long time to pay off the booking fee, but that is immaterial. (*People v. DeFrance* (2008) 167 Cal.App.4th 486, 505.) There is no time limit within which the fee needs to be paid.

(*People v. Kipp* (1998) 18 Cal.4th 349, 366, quoting *Strickland, supra*, 466 U.S. at p. 686.)

The first element of an ineffective assistance of counsel claim “requires a showing that ‘counsel’s representation fell below an objective standard of reasonableness.’ [Citations.]” (*In re Marquez* (1992) 1 Cal.4th 584, 602-603, quoting *Strickland, supra*, 466 U.S. at p. 688.) “ ‘In determining whether counsel’s performance was deficient, a court must in general exercise deferential scrutiny . . .’ and must ‘view and assess the reasonableness of counsel’s acts or omissions . . . under the circumstances as they stood at the time that counsel acted or failed to act.’ [Citation.] Although deference is not abdication [citation], courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight.” (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.) Further, “[i]f the record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation.” (*Ibid.*; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [where record is lacking on appeal, ineffective assistance claim more appropriately litigated via habeas proceeding].)

As to the second element of a claim of ineffective assistance of counsel, a defendant must show that he was prejudiced by counsel’s conduct, that is, it is reasonably probable a more favorable result would have obtained absent counsel’s failings. (*Strickland, supra*, 466 U.S. at p. 688; *People v. Lucas* (1995) 12 Cal.4th 415, 436; *In re Cordero* (1988) 46 Cal.3d 161, 180.) “ ‘The proof . . . must be a demonstrable reality and not a speculative matter.’ [Citation.]” (*People v. Karis* (1988) 46 Cal.3d 612, 656; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) But the court need not determine that counsel’s performance was indeed deficient before examining the prejudice asserted as a result of the alleged deficiencies. “If it is easier to dispose of an ineffectiveness claim on

the ground of lack of prejudice, which we expect will often be so, that course should be followed.” (*Strickland, supra*, 466 U.S. at p. 697.)

It is against this backdrop that we examine defendant’s claim of ineffective assistance in his counsel’s failure to have challenged the booking fee on equal protection grounds. As noted, the court applied Government Code section 29550.1 according to its terms and therefore did not make a determination of Vasquez’s ability to pay the booking fee. Even if counsel had objected to the \$129.75 fee based on equal protection grounds and Vasquez’s inability to pay it, this record does not affirmatively demonstrate prejudice, i.e., that Vasquez lacked the ability to pay the fee, either through prison wages or later employment. We accordingly need not address whether counsel’s performance was deficient and instead proceed to conclude that defendant has failed to meet his burden of showing that his counsel’s performance resulted in prejudice.

II. *Defendant is Not Entitled to Additional Conduct Credits*

Vasquez contends that principles of equal protection entitle him to additional conduct credits. His contention is that the statutory changes to section 4019 and section 2933, expressly operative October 1, 2011, apply retroactively, in effect, so as to entitle him to one-for-one conduct credits under the current version of section 4019 rather than the one-for-two credits he was awarded.

A criminal defendant is entitled to accrue both actual pre-sentence custody credits under section 2900.5 and conduct credits under section 4019 for the period of incarceration prior to sentencing. Additional conduct credits may be earned under section 4019 by performing additional labor (§ 4019, subd. (b)) and by a prisoner’s good behavior. (§ 4019, subd. (c).) In both instances, the section 4019 credits are collectively referred to as conduct credits. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.) The court is charged with awarding such credits at sentencing. (§ 2900.5, subd. (a).)

Before January 25, 2010, which period covers the December 17, 2009 crime here, conduct credits under section 4019 could be accrued at the rate of two days for every four days of actual time served in pre-sentence custody. (Stats. 1982, ch. 1234, § 7, p. 4553 [former § 4019, subd. (f)].) Effective January 25, 2010, the Legislature amended section 4019 in an extraordinary session to address the state's ongoing fiscal crisis. Among other things, Senate Bill No. 3X 18 amended section 4019 such that defendants could accrue custody credits at the rate of two days for every two days actually served, twice the rate as before except for those defendants, like Vasquez, who were required to register as a sex offender, those committed for a serious felony (as defined in § 1192.7), and those with a prior conviction for a violent or serious felony. (Stats. 2009-2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [former § 4019, subds. (b), (c), & (f)].) For these persons, conduct credit under section 4019 accrued at the same rate as before despite the January 25, 2010 amendments. (former § 4019, subds. (b)(2) & (c)(2).) These amendments to section 4019 effective January 25, 2010, did not state whether they were to have retroactive application.

California courts subsequently divided on the retroactive application of the amendments to section 4019, effective January 2010, and the issue currently remains pending with the California Supreme Court for resolution. (See *People v. Brown* (2010) 182 Cal.App.4th 1354, rev. granted Jun. 9, 2010, S181963, and related cases.)⁹

Then, effective September 28, 2010, section 4019 was amended again to restore the less generous pre-sentence conduct credit calculation that had been in effect prior to the January 2010 amendments, eliminating one-for-one credits. (Stats. 2010, ch. 426,

⁹ Our own view is that the January 2010 amendments to section 4019 were not retroactive, even in the face of an equal protection challenge analytically akin to that mounted here. (See *People v. Hopkins* (2010) 184 Cal.App.4th 615, 627-628, review granted Jun. 21, 2010, S183724 [briefing deferred pending decision in *People v. Brown*, *supra*].)

§ 2.) The express provisions treating differently those defendants, like Vasquez, who are subject to sex-offender registration requirements, and those committed for a serious felony or with a prior conviction for a violent or serious felony were also eliminated. (*Ibid.*) At the same time, and by the same legislative action, section 2933, previously applicable only to worktime credits earned while in state prison, was amended to encompass pre-sentence conduct credits for those defendants ultimately sentenced to state prison (Stats. 2010, ch. 426, § 1 [former § 2933, subd. (e).] In other words, as of September 28, 2010, section 2933 instead of section 4019 applied to the calculation of pre-sentence conduct credits for those defendants sentenced to a prison term, with an exception pertinent here. This amendment to section 2933 provided for one-for-one pre-sentence conduct credits, more generous than those simultaneously provided under section 4019, but excluded those inmates, like Vasquez, required to register as sex offenders and those committed for a serious felony or with a prior serious or violent felony conviction. Under this version of section 2933, subdivisions (e)(1) and (e)(3), these prisoners remained subject to an award of pre-sentence conduct credits under section 4019, accruing at the less generous one-for-two rate. (*Ibid.*) By its express terms, the newly created section 4019, subdivision (g), declared these September 28, 2010 amendments applicable only to prisoners confined for a crime committed on or after that date, expressing legislative intention that they have prospective application only.¹⁰ (Stats. 2010, ch. 426, § 2.)

This brings us to legislative changes made to sections 4019 and 2933 in 2011, as relevant to Vasquez's equal protection challenge. These statutory changes, among other things, effectively made section 4019 again applicable to all prisoners for purposes of the calculation of pre-sentence conduct credits, eliminating this element of section 2933 that

¹⁰ These versions of section 4019 and 2933 were in effect when Vasquez was sentenced on June 30, 2011. By noting this, we do not mean to imply that these versions of the statutes necessarily applied to him.

was in place from September 28, 2010 to September 27, 2011 only, and reinstated one-for-one pre-sentence conduct credits for all prisoners. (§§ 2933 & 4019, subs. (b), (c) & (f).) These changes to section 4019 were made expressly applicable to crimes committed on or after October 1, 2011, the operative date of the amendments, again expressing legislative intent for prospective application only.¹¹ (§ 4019, subs. (b), (c), & (h).)

As noted, Vasquez committed the crime on December 17, 2009, and was sentenced on June 30, 2011. Under the law in effect on either date, he was properly awarded conduct credits on a one-for-two basis (411 days actual credit and 204 days conduct credit).¹²

Notwithstanding the express legislative intent that the changes to section 4019, operative October 1, 2011, are to have prospective application only, Vasquez contends, on equal protection grounds, that he is entitled to the reinstated one-for-one conduct credits implemented by those changes (411 actual days and 410 days of conduct credit).¹³ He argues that *In re Kapperman* (1974) 11 Cal.3d 542, 544-545 (*Kapperman*) compels this result, contending that it held that a new statute that provides for pre-sentence credits

¹¹ These changes took place by two separate amendments. (Stats. 2011, ch. 15, § 482; Stats. 2011, ch. 39, § 53.) Section 4019 was also amended a third time in 2011, in respects not relevant here. (Stats. 2011, 1st Ex. Sess., ch. 12, § 35.)

¹² This is because based on the date of sentencing, and as alleged in the information and admitted by Vasquez, he fits into that category of persons required to register as a sex offender or with a prior serious felony conviction, who were treated less generously as to an award of pre-sentence conduct credits for the period between September 28, 2010 and September 30, 2011. (Stats. 1982, ch. 1234, § 7 [former section 4019]; Stats. 2010, ch. 426, §§ 1 & 2 [amended former sections 2933, subs. (e)(1) & (e)(3) & 4019, subd. (f), eff. Sept. 28, 2010].)

¹³ Respondent contends that Vasquez has forfeited this argument for his failure to have raised it below. We exercise our discretion to reach the merits because the current version of section 4019 that Vasquez argues should apply was not yet operative through the date that he was sentenced.

for prison inmates “was fully retroactive to all prisoners by virtue of the equal protection clause.” He also cites *People v. Sage* (1980) 26 Cal.3d 498, 507-508 (*Sage*), and urges that it implicitly held “that felons were similarly situated to all other jail inmates” and that the “then version of . . . section 4019 was violative of equal protection since it denied conduct credit to felons who were sentenced to prison” while making such credits available to other jail inmates.

Preliminarily, to succeed on an equal protection claim, a defendant must first show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. In considering whether state legislation is violative of equal protection, we apply different levels of scrutiny to different types of classifications. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836-837.) Where, as here, the statutory distinction at issue neither “touch[es] upon fundamental interests” nor is based on gender, there is no equal protection violation “if the challenged classification bears a rational relationship to a legitimate state purpose. [Citations.]” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 (*Hofsheier*); see also *People v. Ward* (2008) 167 Cal.App.4th 252, 258 [rational basis review applicable to equal protection challenges based on sentencing disparities].) Under the rational relationship test, “ ‘ ‘ ‘ a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [Citations.] Where there are “plausible reasons” for [the classification], “our inquiry is at an end.” ’ ’ ’ ” (*Hofsheier, supra*, at pp. 1200-1201, italics omitted.)

In *Kapperman*, the Supreme Court reviewed a provision (then-new § 2900.5) that made actual custody credits prospective, applying only to persons delivered to the Department of Corrections after the effective date of the legislation. (*Kapperman, supra*, 11 Cal.3d at pp. 544-545.) The court concluded that this limitation violated equal

protection because there was no legitimate purpose to be served by excluding those already sentenced, and extended the benefits retroactively to those improperly excluded by the Legislature. (*Id.* at p. 545.) But *Kapperman* is distinguishable from the instant case because it addressed *actual* custody credits, not *conduct* credits. Conduct credits must be earned by a defendant, whereas custody credits are constitutionally required and awarded automatically on the basis of time served.¹⁴

Sage is likewise inapposite, because it involved a prior version of section 4019 that allowed pre-sentence conduct credits to misdemeanants, but not felons. (*Sage, supra*, 26 Cal.3d at p. 508.) The high court found that there was neither a “rational basis for, much less a compelling state interest in, denying presentence conduct credit to detainee/felons.” (*Ibid.*, fn. omitted.) But here, the purported equal protection violation is temporal, rather than based on defendant’s status as a misdemeanor or felon. (*People v. Floyd* (2003) 31 Cal.4th 179, 189-191 [“ ‘punishment lessening statutes given prospective application’ ” on a certain date “ ‘do not violate equal protection’ ”].)

One of section 4019’s principal purposes is to motivate or reward good behavior while in pre-sentence custody, and it is impossible to influence behavior after it has occurred. The fact that a defendant’s conduct cannot be retroactively influenced provides a rational basis for the Legislature’s express intent that the October 2011 amendments to section 4019 apply prospectively. (*In re Stinette* (1979) 94 Cal.App.3d 800, 805-806 [prospective only application of provisions of Determinate Sentencing Act (§ 1170 et seq.) upheld over equal protection challenge]; *In re Strick* (1983) 148 Cal.App.3d 906,

¹⁴ We likewise reject defendant’s reliance on *People ex rel. Carroll v. Frye* (1966) 35 Ill.2d 604, as cited in a footnote in *Kapperman* (11 Cal.3d at p. 547, fn. 6). This Illinois case, like *Kapperman*, was dealing with actual custody, and not conduct, presentence credits. Moreover, the date that was considered potentially arbitrary or fortuitous in the equal protection analysis was the date of conviction, a date out of defendant’s control, and not the date the crime was committed. (*People ex rel. Carroll v. Frye, supra*, 35 Ill.2d at pp. 609-610.)

912-913 [prospective only application of statutory changes designed to incentivize productive work and good conduct of prison inmates upheld over equal protection challenge].) This is so even if an inmate, like Vasquez, has already earned the maximum amount of good conduct credits available under the applicable former version of the statute and is only claiming entitlement to *additional* conduct credits for the same good behavior that earned him those conduct credits in the first place.

We accordingly reject Vasquez's contention that he is entitled to additional conduct credits based on amendments to section 4019, operative October 1, 2011.

DISPOSITION

The judgment is affirmed.

Duffy, J.*

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Mihara, J.

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.